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ABSTRACT

This paper explores questions of institutional responsibility and the potential for legal liability falling on public school institutions as a result of their involvement with computer-networking technology. First, the paper examines the doctrine of sovereign immunity to understand the limits of government responsibility for damages in this context. Second, the separate liability of school officials and employees is discussed. Third, ways of using computer networks are related to questions of legal liability, with particular focus on the issue of electronic publication of defamatory statements. Fourth, the paper addresses how school authorities might balance protection against liability with the constitutional rights of students. Lastly, some guidelines are proposed for the prudent control of school computer networks. Seventy-two notes are included. (SR)

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SCHOOL COMPUTER NETWORKS: ELECTRONIC PUBLISHING AND LEGAL LIABILITY IN THE PUBLIC SCHOOL

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SCHOOL COMPUTER NETWORKS:
ELECTRONIC PUBLISHING AND LEGAL LIABILITY IN THE PUBLIC SCHOOL

> The classroom is peculiarly the "market-place of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues. . . "[1]

Introduction: Computer Networks in Education

Elementary and secondary educational institutions are beginning to make use of the communications capabilities of computers. With relatively inexpensive personal computers and modems (communications devices that allow computer information to be transmitted and received over normal voice telephone lines) many classrooms and education-administration offices across the country and around the world are now undertaking network activities such as electronic mail, data-base information retrieval, computer conferencing, and electronic journals and newsletters.

This new technology has the potential to enrich the experience of administrators, teachers, and students as it opens up opportunities to communicate with distant classrooms and school districts. At the same time, computer networking may raise some novel problems for school authorities as students are given a more powerful means of interacting with the social environment, and as traditional lines of authority for curriculum content are challenged.

Some people involved in or observing this effort see school-based electronic publishing as truly revolutionary and likely to produce profound social effects--ultimately in how people work and how communities

are organized, as well as in the processes of education.[2] Others see as it as a potentially interesting adjunct to other media--books, television, other uses of computers--in the evolving modern classroom, though not particularly "revolutionary".[3] Still others see communication as the most problematic and one of the least appealing of the applications of computers in education because of the difficulty of learning fundamental computer-communication skills and because of the uncertain institutional framework within which the technology is to be applied.[4]

In any case, the necessary technology is now commonplace in schools and their supporting offices so that, potentially, thousands of elementary and secondary educational institutions and millions of students can engage joint interests using this medium.[5] Moreover, significant projects are currently underway demonstrating that, under favorable conditions, teachers, administrators, and students can find practical tools and rich learning experiences in educational computer communications.

As schools become involved in operating computer-network systems for the educational community, they must be sensitive to their legal responsibilities as publishers. There have been reports in the press of computer bulletin-board systems (BBSs) being used to perpetrate a range of "computer crimes."[6] To what extent are public school authorities responsible for the messages that flow over their systems? In particular, might educators or municipalities face tort damage suits for the content of their systems? And how might they protect themselves from liability while realizing the exciting potential of computer-network "classrooms without walls"? This paper examines these questions of institutional responsibility and the potential for legal liablity falling on public-

school institutions as a result of their involvement with computer-networking technology. First, the doctrine of sovereign immunity is examined to understand the limits of government responsibility for damages in this context. Second, the separate liability of school officials and employees is discussed. Third, ways of using computer networks are related to questions of legal liability, with particular focus on the issue of electronic publication of defamatory statements. Fourth, how school authorities might balance protection against liability with the constitutional rights of students is addressed. And lastly, some guidelines are proposed for the prudent control of school computer networks.

I. The Doctrine of Sovereign Immunity Applied to School Districts

Under common law, school districts are generally not liable for torts, whether they are committed by the district itself or by its officers, agents, or employees.[7] This immunity from liability is based upon the tradition that the state is sovereign and therefore cannot be sued without its consent.[8] Additional--and more modern--rationales for state tort immunity extending to public school districts include: 1) the fact that funds are not normally appropriated for tort damages, 2) that such expenditures would not be made, strictly speaking, for school purposes, and 3) that school board members in committing torts are acting beyond their public authority.[9] By extension, school boards and their governing districts are generally not responsible for torts committed by employees; there is no reasonable application of the rule of <u>respondeat superior</u> from

board member to school district or from employee to school board because the "servant" is not acting within the scope of his employment when committing a tort.[10]

There are several exceptions to the general tort immunity that school districts enjoy. Since it is a common law doctrine, either courts may modify or legislatures may abrogate this immunity.[11] States vary widely in the nature and extent of legislative abrogation of the doctrine. Since the concept has such a long history courts are reluctant to abandon it entirely and so have recognized certain limited exceptions:[12]

Proprietary Acts:

Courts have recognized that a school district is liable for torts connected with "proprietary" functions, as distinguished from "governmental" functions. In performing acts classed as the former--that is, acts whose primary motive is private gain rather than official public service--school districts are not to be considered public agencies and are thus held to be legally accountable. Courts often make this distinction on arbitrary factual grounds, so prediction as to whether a particular act will be considered proprietary is difficult. Most cases have concerned personal injuries incurred at events on school property where there was a charge for admission. Some state courts have ruled that if the facility was being rented to outsiders for a non-school event, then the district was liable under proprietary-act theory.[13] Other courts have rejected this argument and upheld immunity on grounds that the event was primarily for the public benefit.[14]

Regarding computer networks, the key considerations for school boards

may be 1) whether the school charges a fee for use of networking facilities, and 2) to what extent participants outside the ambit of the school community have authorized access. Some schools require payment of a subscription charge for off-campus access to the school computer system; courts may infer proprietary liability unless such paid access is restricted in some way, for example, only to students or educational personnel, or perhaps explicitly to educational uses.

Nuisances:

Injured persons have been successful in overcoming school district immunity based on "forms of annoyance or inconvenience interfering with common public rights," or "nuisances".[15] This exception to general immunity is derived from the legal theory of negligence. However, as with proprietary acts, it is difficult to predict what situations courts will find to be actionable nuisances. As one court put it, a nuisance "involves as an essential element that it can be the natural tendency of the act or thing complained of to create dangers and inflict injury upon person or property."[16]

Courts may draw a distinction between nuisance and negligence on the basis of the remedy sought; a district may be immune from damages based on negligence and yet be required to abate a nuisance. A claim that school actions interfere with the enjoyment of private property rights has proven to be a strong theoretical approach to overcoming district immunity. For instance, pollution from a school that affects private property has resulted in district liability for maintaining a nuisance.[17] However, school districts have been successful in maintaining immunity for

conditions that cause personal injury on school premises.[18]

In the case of computer networks, school districts may risk liability under nuisance theory if they do not have a mechanism to monitor and respond to complaints about the traffic on their systems, particularly if access to messages can be obtained outside of school grounds.[19]

Legislative Abrogation of Sovereign Immunity:

Legislative abrogation of immunity has taken several forms. Of particular interest to districts involved in computer networking include: 1) a California statute that makes a district liable for injury to persons or property resulting from negligence of the district, its officers, or its employees; 2) a North Carolina statute that sets up a commission to rule on the negligence of school district officers or employees and to assess damages to persons and property. Other states have laws that require school districts to defend teachers who have suits brought against them in connection with their official duties and to pay any resulting damages.[20]

II. Liability of School Officials and Employees

Notwithstanding the immunity enjoyed by the school district, officers and employees may be liable for school computer-networking activites that result in personal injury or property damage.

Officials--for example, superintendants and school board members--enjoy some protection from liability for acts that are merely negligent; that is, if such acts are not corrupt, malicious, or beyond the scope of

official duties. This rule acknowledges that school board members would be reluctant to serve were they to be held responsible for negligent activites undertaken in good faith.[21]

The distinction between "discretionary" and "ministerial" actions is also relevant to the determination of officials' liability. Discretionary acts made in good faith are generally immune. Ministerial acts are those in which an official is bound by statute to carry out the act, such that injured parties may recover damages if the official can be shown to have failed to perform the act (nonfeasance) or to have performed the act improperly (malfeasance). The application of this distinction is somewhat unpredictable; quite similar factual circumstances have resulted in opposite court rulings.[22] In one ruling, even though the court considered a school-board member's decision to authorize a particular activity discretionary, actual management of that activity was considered ministerial and thus the official was liable for personal injury.[23] Generally, officials are not individually liable for ministerial duties required of the board as a corporate body.[24]

Of particular relevance in regard to computer networking, school board members enjoy a conditional immunity from the tort of defamation.[25] It is unclear, though, whether this immunity extends beyond public board meetings and executive sessions; it does not extend to statements made beyond the scope of official duties, or to statements made with malice, with knowledge of falsity, or with reckless disregard for the truth.[26]

Like school district officers, school employees--teachers, principals, guidance counselors, etc.--do not enjoy the near-absolute immunity from tort liability that attaches to school districts. In fact, teachers in

particular are quite vulnerable to suits because of the great range of activities in which they are in loco parentis to their students and are thus directly responsible for supervising student behavior.[27] In situations where there are partial school-district and school-official immunities the potential liability of school employees is increased because an injured party may have no respondeat superior recourse and so must sue the individual directly responsible. Moreover, unlike school officials, school employees are liable for mere negligence.

Most liability actions against school employees involve a question of adequacy of supervision. "Theoretically, adequate supervision of pupils would prevent injuries to them from reasonably foreseeable dangers. Lack of proper supervision constitutes negligence."[28] Negligence can be based on performing in a way that a reasonably prudent person would not perform, or failing to perform in a prudent way. However, school personnel are not insurers of pupils' safety; that is, they are not liable for unavoidable or pure accidents in which there is no legal fault. The standard that courts generally apply is one of "due care."[29] Prior warning or notice of a potentially injurious situation often decides a case against a school employee.[30] While the mere absence of a supervisor is not sufficient in all cases to warrant a finding of negligence, length of absence may be crucial.[31] It is also important whether a teacher could reasonably foresee the possibility of injury while he was absent.[32]

Under the in loco parentis doctrine, school employees may be held responsible when one student injures another; even though a student's misconduct may be the immediate precipitating cause of injury, negligent supervision may be judged the proximate cause and therefore actionable.[33]

If educators take reasonable precautions to prevent students injuring one another they can increase their chances of being found innocent of negligence, particularly if an intervening act occurs that was not reasonably foreseeable.[34] Conversely, negligence may be found in certain situations if school supervisors have established no rules for student conduct;[35] and the establishment of rules can weigh in the favor of supervisors.[36]

Supervision is required over extracurricular activities when they are endorsed by the school.[37] School officials may escape liability where teachers are found at fault if the teacher is deemed qualified and officials have established rules for student conduct.[38] A supervisor can be bound by what he might have known about a situation had he been reasonably diligent.[39]

Although, like school officials, employees enjoy a qualified privilege against liability for defamation, most cases have involved evaluations of teachers by their superiors or evaluations of students by teachers.[40] It is unclear to what extent defamation by school employees or by the students in their charge is actionable in the context of computer networking. But from the foregoing, it is prudent to assume that in certain situations school authorities may be held responsible.

III. Legal Pitfalls in School Computer Networking

There are a number of activities involving school-operated computer networks that could conceivably result in legal action against the school district, its officers, or its employees. These would include the

publication of stolen credit card numbers, breaking into other computer systems, making long-distance telephone calls without paying, violations of privacy rights, publication of obscenities, and infringements of copyright. Ideally, each of these situations would be guarded against by the school supervisor, and monitoring all messages that pass through the system should alert school authorities to possible violations. However, such extensive supervision could prove to be a burdensome task should the services become popular.

Notwithstanding efforts to monitor messages, copyright violation may cause trouble because violators can remove copyright notice from protected software; but the student violator's removal of the copyright notice in itself may be a defense against a charge that the school was liable for contributory infringement.[41] Similarly, students or other users of school computer networks could use secret codes to hide their transmissions of illicit messages; but again, in such cases the school or its employees are unlikely to be held legally responsible for damages.

The Case of Defamation:

Considering the nature of the user population, a peculiar type of message may be commonly troublesome for school computer-network operators: the message that contains a defamatory statement. Defamatory statements are false statements about a person that tend to injure his reputation or standing in the community. Defamatory statements may constitute slander or libel: Slander is a spoken defamatory statement; libel has traditionally been a written statement that defames. The common-law "strict liability" standard for defamation has required the plaintiff to

prove that he was identified in the statement by name or inference, and that the statement was made to a third party.

Children can be cruel, and are often known to slander one another, that is, to speak to third parties in ways that may injure a person's reputation. Though slander is actionable defamation, children (and most adults) generally escape legal punishment for their ill-considered or immature spoken statements about others because the offense results in relatively little reputational injury.

Given their access to computer networks, though, children's defamatory statements take on a new legal dimension. Historically, reputational injury caused by slander has been distinguished from the more serious tort of libel by assumptions about the permanence of the statement, the geographic extent of its dissemination, the intent of the publisher, and the resultant harm to reputation caused by the statement.[42] Reputational injury is assumed under common law if the statement is libelous on its face (per se libel), that is, if it is a written statement that obviously defames the plaintiff. Consequently, computer networks, for the purposes of libel law, put students and other users in the position of publishers, and operators of computer-network facilities--such as public schools--potentially in the position of republishers of defamatory statements.[43]

Certainly, any school official or employee might be found liable for libel if he personally defamed another using a computer network; in that case he would be personally liable for publication. But much more troubling is the fact that each time another individual retrieves a defamatory message from the system another separate actionable libel could be considered to have occurred; each separate instance of retrieval might

be considered an actionable republication.[44] When a person repeats a libelous statement originally made by another it is considered republication; and both the original publisher and the republisher may be separately liable for each recurrance of the libel.[45]

Truth is always a defense against a charge of libel, but defendants normally must prove their libelous statements true because under common law it is assumed that per se libels are false. This can place a heavy burden on the defendant. Recognizing this, the U.S. Supreme Court recently ruled that in those cases where the speech in question is of public concern the burden of proof must now fall on the plaintiff; i.e., a defamatory statement that involves an issue of public concern must now be proved false in order "To ensure that true speech on matters of public concern is not deterred. . . "[46] It is not clear at this point the extent to which schools sponsoring computer networks will be able to sustain a claim that particular offending messages are matters of public concern; different courts in different cases may decide differently.

The Supreme Court has afforded publishers protection from libel on additional grounds. Prior to New York Times v. Sullivan[47] all plaintiff had to prove to be entitled to damages for injury to his reputation was that a defamatory statement identified him and that defendant had published it. The Sullivan decision, and a subsequent opinion in Gertz v. Robert Welch, Inc.,[48] distinguished libels published about public officers or public figures from those made about private persons. The Court recognized that the fear of lawsuits could intimidate publishers into self-censorship, thus depriving citizens of the means to hold public officials and public figures accountable, to exercise self-government, and

to bring about peaceful social changes.[49] Now, if plaintiff is a public official or public figure he must prove that the publisher made the libelous statement with "actual malice," that is, with knowledge that it was false or with reckless disregard of its falsity. Moreover, even if the plaintiff is a private person he must now prove that the statement was made with negligence; i.e., there can be no finding of liability for publishing false statements without a finding of fault on the part of the publisher, and it is left to the states to determine the proper standards for assessing fault in cases of libels of private individuals.[50] In Gertz, the Court explicitly refused to rule on hypothetical state standards-of-practice for publishers.[51]

As students begin publishing on school-sponsored computer networks--where journalistic standards are nascent, where the open-ended nature of the medium means that standards may be extremely difficult to codify, and where the school is looked to for instruction and supervision of student activities--prudent school authorities will carefully consider conditions of access to and mechanisms for monitoring their systems.

Only if absolutely no content control is exercised by the transmitter of a libelous message--such as is the case with telephone companies, other common carriers, news vendors, and libraries--and such a transmitter does not know or have reason to know of libelous content, is the transmitter free from responsibility.[52] The general rule for liability involving retransmissions of libels is thus "the more discretion a disseminator of news has to alter the content of the message to be published, the higher is the disseminator's duty of care."[53]

Since the Court's recent ruling in the Hazelwood case,[54] the question

of school responsibility for the content of school-sponsored computer-network systems would appear to be acute. As will be seen below, how the school chooses to organize networking activities will affect the extent to which it may be liable, and, in turn, will suggest that certain forms of control are indeed prudent in those cases where the school does have substantial discretion over content.

IV. Balancing Liability and Constitutional Rights in School-Sponsored Network Services

School computer networks are likely to provide a number of different types of services to students and other users. The standard of care they may be held to by the courts in defamation suits and other tort actions is likely to vary with the nature of the different services they provide. Just as important, as vehicles of speech computer networks raise issues beyond protection against liability: schools have a responsibility to balance the need for safety with respect for the constitutional rights of students and other users of school-sponsored computer networks. Such balancing, too, will depend upon the types of computer-networking activities that schools undertake.

Schools may provide electronic-mail services to individual teachers, administrators, or students. Messages transmitted in such a common-carrier-like service might be considered uncontrolled by the school if the messages are to be read only by those to whom they are specifically addressed. However, computer-network system operators usually do have access to <u>all</u> messages, whether private mail or public announcements, and so courts may find that the operator had <u>reason</u> to know of defamatory or other illicit statements. Commonly, "content control by a computer

[network operator] is technologically possible, but infrequently and irregularly practiced."[55] Notwithstanding the practical problem of monitoring all messages that flow through a school computer system, school administrators may have an affirmative duty to investigate and to search ostensibly "private areas"--such as school lockers, and by extension school computer files--when they are apprised of the possibility that a student may possess illicit material.[56] Users of systems should be told the conditions under which their "private" communications are to be subject to inspection by system operators so that they may voluntarily avoid personal embarrassments and injury to others.

School computer networks also generally provide a "community bulletin-board" service for users. As well as announcements and classified inquiries, electronic bulletin board systems (BBSs) often contain a section devoted to the trading of computer programs that users make available and others may "download" and add to their personal collections. Once the operator or supervisor of the service has notice that a defamatory or other illegal message--for example, an unauthorized offer of a copyrighted program, or an obscene or defamatory statement--has been posted in his facility, failure to remove the offending message within a reasonable time probably constitutes a "republication for which the proprietor or controller can be held liable."[57] Schools are likely to be upheld in their decisions to remove any objectionable material that clearly enjoys no First Amendment protection.

A third type of service is access via "electronic gateways" to a number of off-campus computer-network services like: 1) commercial or public databases, from which information may be "downloaded" onto the local

computer; 2) commercial electronic mail systems, such as The Source, with which users may trade messages or software on a national or global scale; 3) other private or perhaps school-operated networking systems that allow users to exchange messages, information, and computer programs with specialized groups. School authorities will be interested in monitoring these activities to control long-distance and subscription-service costs. The content of messages going in and out of the school to and from distant systems will also be of concern as the damages for publication of defamations and other illegal messages can multiply as publication spreads; and publication in other states may result in separate causes of action, since it is unclear whether or to what extent states will apply to computer messages the "single publication rule" that has attached to libelous statements in newspapers, other printed works, and simultaneous broadcasts.[58]

A fourth general type of service many school computer networks provide is the computer conference. Conferences may be public, such that anyone with access to the system as a whole may read and comment on the flow of messages, or they may be private, requiring one to have specific authorization to observe or contribute to a particular discussion. Responsibility of the school for defamatory statements made in these forums may vary with the type of authorization and content oversight the school exercises; it may also depend on the nature of the topic(s) under discussion in the forums.[59] In the recent Hazelwood case,[60] which is discussed in detail below, the Supreme Court, notwithstanding concerns about students' First Amendment rights, recognized broad power vested in school authorities to control the content of public-school-sponsored

publications. A school's wide discretion over content implies an equally expansive responsibility to monitor and certify publications it endorses.

A fifth type of service schools may offer is an electronic journal or newsletter.[61] The Hazelwood case established criteria that have important implications for schools adopting computer networking in publication-oriented curricula. In Hazelwood, the Court, although affirming the generality that students do not "shed their constitutional rights to freedom of speech at the schoolhouse gate" (citing the 1969 Tinker decision[62]), maintained that students' First Amendment rights "are not automatically coextensive with the rights of adults in other settings."[63] A public school need not tolerate speech that is inconsistent with its basic educational mission, even though the government would not be allowed to interfere with similar speech outside the school.

Previously, the Court had recognized that schools could control speech that authorities have reason to believe will substantially interfere with the work of the school or the rights of others.[64] Another justification for limiting expression would be if publication could result in tort liability against the school.[65]

The Hazelwood Court cited three additional justifications for school authorities to censor the content of school-sponsored publications: 1) to protect students against "material that may be inappropriate for their level of maturity"; 2) to disassociate the school from speech it considers "wholly inconsistent with the 'fundamental values' of public school education"; and 3) "to assure that [students] learn whatever lessons [a particular expressive] activity is designed to teach."[66]

Justification for the power that schools may exercise over student

expression was found to rest on a distinction the Court drew between cases in which a school punishes expression that happens to occur on campus (as in Tinker), and cases where a school refuses to lend its name and resources to the dissemination of student expression (such as the situation in Hazelwood). The later might seem to allow a government-imposed prior restraint on publication, though, which the Court has said requires a censor to demonstrate a that "clear and present danger" will result should the publication go forward.[67] The Court's argument that schools may exercise censorship under less extreme circumstances was bolstered by an analysis of the nature of the particular school publication in question.

The Court ruled that the school newspaper was not a "public forum." School facilities are to be considered public forums only if authorities have by policy or practice opened them for indiscriminant use by the general public or some segment of public such as student organizations. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[68] Moreover, the Hazelwood School Board had established a prior policy regarding the status of the school newspaper, stating that it was to be considered part of the curriculum in regular classroom activities; also, the school curriculum guide described the paper as being for the purpose of developing journalistic skills and responsibilities among journalism students. The Court ruled that if facilities "have . . . been reserved for other intended purposes . . . then no public forum has been created, and school officials may impose reasonable restrictions on speech of students,

teachers, and other members of school community."[69]

The Court was also impressed by the established procedures under which publication of the particular school newspaper in question took place: It was part of established journalism curriculum; work on it was a regular classroom activity under the teacher's control in almost every aspect of publication; standard practice was for the teacher to select student editors, schedule publication dates, decide the number of pages for each issue, assign story topics, edit stories, select and edit letters to the editor, and deal with the printing company. As well, the journalism teacher routinely submitted page proofs to the principal for review prior to publication. Regarding the particular issue of the newspaper in question, the principal submitted his decision to censor two pages to his superiors and they approved.

The Court found that there was clearly no move by school authorities to open pages of the newspaper to indiscriminant use by students or others. The Court considered the school's withholding of its endorsement from certain implied norms and the school's concern about fairness in journalistic practice to be reasonable grounds for censorship. The need for immediate decision was a reasonable justification for deleting unobjectionable articles that happened to fall on the same pages as objectionable ones. The Court held that any valid educational purpose in such a case will suffice as a justification for controlling the content of school-sponsored student publications.[70]

Regardless of one's view of the wisdom of the Court's ruling in the Hazelwood case, it follows from this decision that when school officials exercise authority over the content of student publications they

concomitantly assume responsibility for such content. In operating computer networks it is unclear to what extent, post Hazelwood, schools will be able to avoid responsibility for student-generated content in these systems.

Inevitably, students are in school to learn proper behavior as well as particular skills. We hope that in our public schools we also teach young people to think for themselves--that they will learn to act in what they perceive to be socially productive ways. One of the keys to this result is that they learn the proper balance between rights and responsibilities.

Now a school may not require its advance approval for the content of independent--so-called "underground"--student publications; that would be an illegal prior restraint on publication.[71] The school may, however, establish rules in advance specifying the time, place, and manner of the distribution of student publications; it may then punish students for violating these rules.[72] The reasoned and explicit promulgation of rules regarding our cherished right as Americans, the right to freedom of speech, is wise pedagogy and wise citizenship.

V. Standard Procedures for Monitoring and Control of School Computer Networks

Below are some general procedures that can help schools prevent or avoid liability in operating computer networks while respecting users' constitutional rights and encouraging the use of this exciting new educational medium.

- Designate a faculty member or other school employee as "system operator"; he will have the job of overseeing the general conduct of

network operations, both technical and administrative; delineate lines of authority for decisions about the content and or uses of the school system.

- It would be most prudent to restrict access to individuals with a demonstrated affiliation to an educational institution, though school authorities may consider such restriction an unreasonable limit on the usefulness of the network; in any case, prescreening users--requiring them to identify themselves by name, address, and telephone number --is essential.

- Warn all users signing on that the system is intended for educational purposes only, that they are responsible for the messages they communicate on the system, that users are not to transmit defamatory, obscene, or illegal messages, or to copy or transmit copyrighted software, and that users have a duty to report any illegal messages to the system operator; apprise all users of the rules for using the system and the behavior that may result in revocation of network privileges.

- Require all communications to be accompanied by the identity of the sender of the message.

- Review all generally-available messages, such as community announcements or software for downloading.

- Immediately remove any questionable messages and notify the originator.

- Respond immediately to any complaints received about the content of messages, and be sensitive to the potential for liability by removing any questionable messages.

- Establish due-process procedures for the revocation of users' network privileges, which include, at least, notification of the charges against an individual, the nature of the evidence against him, and an opportunity for him to respond to the charges before privileges are revoked.

ENDNOTES

1. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

2. J. Levin, et al., Education on the Electronic Frontier: Teleapprenticeships in Globally-distributed Educational Contexts, 12 Contemporary Educational Psychology 254-260 (1985).

3. Michael D. Waggoner, A Forecast for Technology and Education: The Report of a Computer Conferencing Delphi," Education and Technology, Vol. 19, No.6, June 1986, at 92-96.

4. Telephone interview with Professor Henry J. Becker, Johns Hopkins University (September 1987).

5. Professor Becker's research found that 25% of high schools and about 4% of elementary schools had one or more computers equipped with modems in 1985 (telephone interview, September 1987).

6. D. Stipp, Computer Bulletin Boards Fret Over Liability for Stolen Data, Wall St. J., Nov. 9, 1984, 33; A. Pollack, Free Speech Issues Surround Computer Bulletin Board Use, N.Y. Times, Nov 12, 1984, A1, D4; 2 Michigan Teens Held in Computer Hacking, Chicago Tribune, May 26, 1989, 3. Bulletin-board systems are proliferating because they provide some indispensible services to computer enthusiasts. First and foremost, they are a means of bringing information about new equipment and software to the attention of users. They also provide access to training in the form of advice and tips on different computer systems. Further, BBSs provide general community support as they are a forum in which to post announcements of meetings and special events. As well, BBSs often offer public-domain software for downloading, thus expanding the "toolboxes" of many computer users. Educators are beginning to use BBSs to discuss school policy issues and to engage in planning and evaluation of curricula. E. Dowdy, Computer Networks in Elementary and Secondary Education, contract report for the U.S. Congress, Office of Technology Assessment (NTIS order number PB 88-194 675/AS, October 1987). See also, U.S. Congress, Office of Technology Assessment, Power On! New Tools for Teaching and Learning, OTA-SET-379 (Washington, DC: U.S. Government Printing Office, September 1988). Facilities for meeting community needs, such as electronic mailboxes and bulletin boards, can also be used to exchange illegal information, such as copyrighted software and stolen credit-card numbers.

7. 57 Am. Jur. 2d Sec. 23, Municipal, County, School and State Liability.

8. Id., Sec. 26-27.

9. E. Reutter and R. Hamilton, The Law of Public Education, 272 (1979); 57 Am. Jur. 2d, supra note 7, Secs. 27-28.

10. E. Reutter and R. Hamilton, supra note 9, at 272; 57 Am. Jur. 2d, supra note 7, Sec. 84.

11. 57 Am. Jur. 2d, supra note 7, Sec. 23.

12. There are exceptions to the general reluctance of courts to totally abrogate the common law tradition; for instance, the Illinois Supreme Court concluded that the doctrine of school-district immunity from tort liability was no longer appropriate. Molitor v. Kaneland Community Unit School Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959). The Illinois legislature has since limited the amount of recoverable damages and reinstated part of the immunity doctrine. E. Reutter and R. Hamilton, supra note 9, at 279. The Texas court of last resort has expressed displeasure with the immunity doctrine, but has left it to the legislature to change it. Calhoun v. Pasadena Independent School Dist., 496 S.W.2d 131 (1973).

13. Sawaya v. Tucson High School Dist., 78 Ariz. 389, 281 P.2d 105 (1955); Ayala v. Philadelphia Bd. of Public Educ., 453 Pa. 584, 305 A.2d 877 (1973). In 1973 Pennsylvania completely abrogated immunity for school districts.

14. Kellam v. School Bd. of the City of Norfolk, 202 Va. 252, 117 S.E.2d 96 (1960); Smith v. Bd. of Educ. of City of Marietta, 119 Ga.App. 441, 167 S.E.2d 615 (1969).

15. E. Reutter and R. Hamilton, supra note 9, at 275.

16. Laspino v. City of New Haven, 135 Conn. 603, 67 A.2d 557 (1949).

17. Watson v. New Milford, 72 Conn. 561, 45 A. 167 (1900); Briegel v. City of Philadelphia, 135 Pa.St. 451, 19 A. 1038 (1890). Prior notice of an offending condition is particularly persuasive in cases of school-induced property damage, Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

18. Bang v. Independent School Dist. No. 27 of St. Louis County, 177 Minn. 454, 255 N.W. 449 (1929); Jones v. Kansas City, 176 Kan. 406, 271 P.2d 803 (1954); Sly v. Board of Educ. of Kansas City, 213 Kan. 415, 516 P.2d 895 (1973); Bingham v. Board of Educ. of Ogden City, 118 Utah 582, 223 P.2d 432 (1950).

19. Generally, there is no duty to a trespasser, such as if a person were to violate a known rule and make unauthorized use of a specified area of school premises. Ford v. Riverside City School Dist., 121 Cal.App. 2d 554, 263 P.2d 626 (1953).

20. E. Reutter and R. Hamilton, supra note 9, at 280.

21. Id., 281.

22. Cf. Adams v. Schneider, 71 Ind.App. 249, 124 N.E. 718 (1919) and Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952).

23. Adams v. Schneider, 71 Ind.App. 249, 124 N.E. 718 (1919).

24. E. Reutter and R. Hamilton, supra note 9, at 282.

25. Id., 282; see infra this text pp.10-14 for a detailed discussion of defamation and computer networks.

26. E. Reutter and R. Hamilton, supra note 9, at 282-3.

27. Blackstone is credited with the classic statement of the doctrine of in loco parentis: A parent "may . . . delegate part of his parental authority . . . to the tutor or schoolmaster of the child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that is restraint and correction, as may be necessary to answer the purposes for which he is employed." Thus the school supervisor's in loco parentis authority and responsibility toward the student extend to duties "as may be necessary to answer the purposes for which he is employed." A. Morris, Const. & Am. Educ. 2nd. Ed. ACB, 425 (1974).

28. E. Reutter and R. Hamilton, supra note 9, at 284.

29. Schultz v. Scheney School Dist. No. 360, 59 Wash. 845, 371 P.2d 59 (1962).

30. Lilienthal v. San Leandro Unified School Dist., 139 Cal.App.2d 453, 293 P.2d 889 (1956).

31. Cirillo v. City of Milwaukee, 34 Wis.2d 705, 150 N.W.2d 460 (1967).

32. Segerman v. Jones, 256 Md. 109, 259 A.2d 794 (1969).

33. Dailey v. Los Angeles Unified School Dist., 2 Cal.3d 741, 87 Cal.Rptr. 376, 470 P.2d 360 (1970).

34. Swaitkowski v. Board of Educ. of City of Buffalo, 36 A.D.2d 685, 319 N.Y.S.2d 783 (1971); Fagan v. Summers, 498 P.2d 1227 (Wyo. 1972).

35. Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967).

36. Lawes v. Board of Educ. of City of New York, 16 N.Y.2d 302, 213 N.E.2d 667 (1965).

37. De Goover v. Harkness, 70 S.D. 26, 13 N.W.2d 815 (1944); Chappel v. Franklin Pierce School Dist. No. 402, 71 Wash.2d 17, 426 P.2d 471 (1967).

38. Chappel v. Franklin Pierce School Dist. No. 402, 71 Wash.2d 17, 426 P.2d 471 (1967).

39. Summers v. Milwaukee Union High School Dist. No. 5, 4 Or.App. 596, 481 P.2d 369 (1971).

40. Neal v. Gatlin, 35 Cal.App.3d 871, 111 Cal.Rptr. 117 (1973); McLaughlin v. Tilendis, 115 Ill.App.2d 148, 253 N.E.2d 85 (1969); Williams v. School Dist. of Springfield R-12, 447 S.W.2d 256 (Mo.1969); Dawkins v. Billingsly, 69 Okl. 259, 172 P. 69 (1918); DeBolt v. McBrien, 96 Neb. 237, 147 N.W. 462 (1914).

41. In the so-called Betamax case, the United States Supreme Court ruled that because most of the use of video-cassette recorders was for "time shift" viewing and not for retention or distribution of copyrighted works (and was thus a "fair use" under the copyright act), the manufacturer could not be held liable for contributory infringement. SONY Corp. v. Universal City Studios, 464 U.S. 417 (1984). In regard to school photocopying, educators have been generally successful in avoiding liability by posting notices warning users against copyright violations on photocopy machines on school premises, particularly in libraries. The 1976 Copyright Act, which codifed the fair-use test elaborated in William and Wilkins v. United States 487 F.2d 1345 (1973), permits photocopying of parts of certain works if the copy does not substitute for purchase of the original work or provide profit for the copier. 17 U.S.C. Sec. 107.

42. V. Veeder, The History of the Law of Defamation, 3 Colum. L. Rev. 546, 569-570 (1903).

43. R. Charles, Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?, J. L. & Tech., Vol. 2, No. 1, at 121.

44. Prosser Torts 5th ed. HB, 799-800 (1984). Alternatively, courts in some states may find that the original publication of a libel on a computer network is like a single edition of a book or a broadcast, and thus only constitutes a "single publication" regardless of how many people read or view it. Restatement (Second) of Torts, Secs. 577A(2) and (3).

45. Prosser Torts, 5th ed. HB, at 799; J. Thorton, G. Gerlach and R. Gibson, Legal Issues in Electronic Publishing: Libel, 36 Fed. Comm. L. J. 178, 179 (1984).

46. Philadelphia Newspapers v. Hepps, slip op. No. 84-1491 (S.Ct., April 21, 1986). Plaintiff was alleged to have links to organized

crime and to have influenced State government through those links; the court considered speech about this allegation to be of public concern and thus to enjoy special protection from defamation suits.

47. 376 U.S. 254 (1964).

48. 418 U.S. 323 (1974).

49. New York Times Co. v. Sullivan, 376 U.S. 254, 278-283 (1964).

50. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

51. Gertz v. Robert Welch, Inc., 418 U.S 323, 348 (1974).

52. Prosser Torts, 5th ed. HB, at 799; Von Meysenberg v. Western Union Tel. Co., 54 F.Supp. 100 (1944); Anderson v. New York Tel. Co., 361 N.Y.S.2d 913 (1974).

53. R. Charles, supra note 43, at 131 (1987); see also J. Thornton, et. al., supra note 45, at 180.

54. Hazelwood School Dist. v. Kuhlmeyer, slip op. No. 86-836 (S.Ct., January 13, 1988).

55. R. Charles, supra note 43, at 137.

56. See New Jersey v. T.L.O., 53 U.S.L.W. 4083 (1985).

57. Hellar v. Bianco, 111 Cal.App. 2d 424, 244 P.2d 757 (1952). This case involved a statement written on a men's room wall. See also Defamation by Nonfeasance, 5 Stan. L. Rev. 363 (1953).

58. Newspapers and books have protection in some states against the multistate proliferation of libel suits, either by case law or by legislative adoption of the Uniform Single Publication Act (13 U.L.A. 517), though circulation can be a factor in computing damages. Rives v. Atlanta Newspapers, Inc., 139 S.E.2d 395 (1964). Perhaps a call by the public-school community for clarifying legislation regarding computer networks is appropriate.

59. The United States Supreme Court Ruled in a plurality opinion in Dun and Bradstreet v. Greenmoss Builders, Inc. 105 S. Ct. 2939 (1985) that credit report messages disseminated over a computer network were purely private in character, and thus plaintiff did not have to prove negligence or actual malice to prevail in a libel action; the strict liability standard of identification and publication were sufficient to prove guilt in libels concerning matters not of public interest.

60. Hazelwood School Dist. v. Kuhlmeyer, slip op. No. 86-836 (S.Ct., January 13, 1988).

61. See, for example, M. Riel, The Computer Chronicles Newswire: A Functional Learning Environment for Acquiring Literacy Skills, 1 J. of Educational Computing Research 317-37 (1985).

62. Tinker v. DeMoines Independent Community School Dist., 393 U.S. 503 (1969).

63. Citing Bethel School Dist. No. 403 v. Fraser, 487 U.S. ____ (1986).

64. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." Tinker v. DeMoines Independent Community School Dist., 393 U.S. 503, 511 (1969).

65. The Court of Appeals, in reversing the District Court's original finding in favor of Hazelwood school authorities, judged that no tort action could have been maintained against the school on the basis of the content of the censored articles. Kuhlmeyer v. Hazelwood School Dist., 795 F.2d 1368, 1375 (8th Cir., 1986).

66. Hazelwood v. Kuhlmeyer, slip op. No. 86-836, at 10 (S.Ct., January 13, 1988).

67. Whitney v. California, 274 U.S. 357, 373 (1927) (J. Brandeis concurring). Cf. Schenck v. United States, 249 U.S. 47, 52 and New York Times v. Sullivan, 376 U.S. 254.

68. Court in Hazelwood citing Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 802 (1985). Under this theory, it is conceivable that schools could intentionally declare a particular service to be a public forum and thus escape liability for content. The school assumedly would also then have to give up extensive discretion over content.

69. Hazelwood School Dist. v. Kuhlmeyer, slip op. No. 86-836, at 8 (S.Ct., January 13, 1988).

70. Hazelwood School Dist. v. Kuhlmeyer, slip op. No. 86-836, at 12 (S.Ct., January 13, 1988).

71. Tinker v. De Moines Independent Community School Dist., 393 U.S. 503 (1969).

72. See Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973); Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972). This distinction could become important in the context of school computer networks as more and more students have home computers and become involved in networking outside of school. A question may arise as to whether "advertisements" for non-school networks are to be allowed on the school system, and whether such notices might be construed as endorsement by the

school. Similarly, a school (at least this is true for colleges) may not prohibit voluntary association of students based on the group's affiliation, ideology, or advocacy. However, the school may refuse recognition of a student group based on the group's unwillingness to promise to conform their actions to reasonable school regulations. Healy v. James, 408 U.S. 169 (1972).